

CHAPTER 11 WAIVER OF RULES

761—11.1(17A) Purpose and scope.

11.1(1) The purpose of this chapter is to establish a general process for granting waivers or variances (hereinafter referred to as waivers) from the requirements of department rules. A waiver is an agency action which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

11.1(2) This chapter does not preclude the granting of waivers using another process if a statute or another department rule so provides. If the rule for which a waiver is sought has a specific waiver process of its own, this chapter is applicable only when it is specifically cited.

11.1(3) This chapter does not apply to contested case proceedings.

11.1(4) This chapter does not apply to rules that merely define the meaning of a statute or other provision of law if the department does not possess the delegated authority to bind the courts to any extent with its definition.

761—11.2(17A) Authority to grant waiver. The director of transportation may, on the director's own motion or in response to a written petition submitted in accordance with rule 761—11.5(17A), grant a waiver from the requirements of a rule. The decision to grant a waiver shall be made at the sole discretion of the director and is final agency action.

761—11.3(17A) Criteria, considerations and limitations.

11.3(1) The director shall not grant a waiver from the requirements of a rule unless the director or the department has jurisdiction over the rule and the waiver is consistent with any applicable statute, constitutional provision, or other provision of law. The director shall not waive any requirement created or duty imposed by statute.

11.3(2) The director may grant a waiver from the requirements of a rule if the director finds, based on clear and convincing evidence, all of the following:

- a.* Application of the rule will pose an undue hardship.
- b.* The waiver will not prejudice the substantial legal rights of any person.
- c.* The provisions of the rule subject to waiver are not specifically mandated by statute or another provision of law, and the waiver will not cause a denial of federal funds.
- d.* Substantially equal protection of the public health, safety, and welfare will be afforded by means other than that prescribed in the rule.

11.3(3) When a petition for a waiver is submitted, the burden of persuasion rests with the petitioner. The department shall evaluate each petition for a waiver based on the unique, individual circumstances set out in the petition.

11.3(4) A waiver, if granted, shall provide the narrowest exception possible to the provisions of the rule.

11.3(5) The director may place any condition on a waiver that the director finds desirable to protect the public health, safety, and welfare.

11.3(6) A waiver shall not be permanent, unless the director finds that a temporary waiver would be impracticable.

11.3(7) If a temporary waiver is granted, there is no automatic right to renewal. At the sole discretion of the director, a waiver may be renewed if the director finds all of the factors set out in subrule 11.3(2) remain valid.

761—11.4(17A) Decision on waiver.

11.4(1) The director's decision to grant a waiver on the director's own motion or to grant or deny a waiver in response to a written petition shall be in writing and contain:

- a. The name of the person to whom the decision pertains.
- b. A citation to the rule or portion thereof to which the decision pertains.
- c. The facts upon which the decision is based.
- d. The reasons for granting or denying a waiver. If a waiver is granted, the reasons must include the following findings:

- (1) Why application of the rule will pose an undue hardship.
- (2) Why the waiver will not prejudice the substantial legal rights of any person.
- (3) That provisions of the rule subject to waiver are not specifically mandated by statute or another provision of law, and the waiver will not cause a denial of federal funds.
- (4) How substantially equal protection of the public health, safety, and welfare will be afforded.
- e. The scope and duration of a waiver if one is granted.
- f. Any other conditions placed on a waiver if one is granted.

11.4(2) Reserved.

761—11.5(17A) Petition for waiver.

11.5(1) *Petitioner.* Any person may petition the department for a waiver from the requirements of a rule. The petitioner must have a real and direct interest in the matter.

11.5(2) *Form of petition.*

a. A petition for a waiver from the requirements of a rule must be in writing and state clearly at the top of the petition that it is a "petition for waiver of a rule."

b. The body of a petition for a waiver from the requirements of a rule shall contain the following information where applicable and known to the petitioner:

- (1) The name, address and telephone number of the petitioner, and any license, permit or case number applicable to the requested waiver.
- (2) A description of and citation to the specific rule from which a waiver is requested.
- (3) The specific waiver requested, including its scope and duration.
- (4) The reasons for the requested waiver.
- (5) The facts supporting the requested waiver, and a statement attesting to the accuracy of these facts.
- (6) A history of any prior contacts between the petitioner and the department that are related to the requested waiver.
- (7) Whether the petitioner is currently a party to a rule making, declaratory order, contested case or judicial proceeding related to the requested waiver.
- (8) Information regarding the department's treatment of similar situations.
- (9) The name, address and telephone number of any public agency or political subdivision that also regulates the activity in question or that may be affected if the waiver were granted.
- (10) The name, address and telephone number of any person or entity that may be adversely affected if the waiver were granted.
- (11) The name, address and telephone number of any person who has knowledge of facts relevant to the requested waiver.
- (12) Releases authorizing persons with knowledge of relevant facts to furnish that information to the department.

c. A petition for a waiver from the requirements of a rule shall be signed and dated by the petitioner.

11.5(3) *Submission of petition.* A petition for waiver from the requirements of a rule shall be submitted to the Director's Staff Division, Department of Transportation, 800 Lincoln Way, Ames, Iowa 50010.

761—11.6(17A) Action on petition. Following is the procedure for responding to a petition for a waiver from the requirements of a rule:

11.6(1) The department shall acknowledge receipt of a petition immediately.

11.6(2) Before a waiver is granted or denied, the department may request a petitioner to furnish additional information related to the petition.

11.6(3) The director shall issue a written decision to grant or deny a waiver within 120 days after the department receives the petition unless the petitioner agrees to a later time. However, if the matter is also the subject of a contested case proceeding, the decision to grant or deny a waiver need not be issued until after the final decision in the contested case is issued.

11.6(4) The decision to grant or deny a waiver shall contain the information set out in rule 761—11.4(17A).

11.6(5) Within seven days after the decision is issued, the department shall transmit it to the petitioner.

11.6(6) Failure to grant or deny a waiver within the required time is deemed a denial.

11.6(7) The director's decision on a petition for a waiver from the requirements of a rule is final agency action.

11.6(8) A petition for a waiver from the requirements of a rule is independent of a contested case proceeding. Submission of a petition does not delay the time to request a contested case hearing, to appeal a proposed decision in a contested case, or to file a petition for judicial review of a final decision in a contested case.

11.6(9) A petition for a waiver from the requirements of a rule is not required to exhaust administrative remedies before judicial review of a department action under Iowa Code section 17A.19.

761—11.7(17A) Modification or cancellation of waiver. The department may, after notice and opportunity for hearing, modify or cancel a waiver granted pursuant to this chapter if the director finds any of the following:

1. A material fact upon which the waiver is based is not true or has changed.
2. The petitioner withheld or knowingly misrepresented a material fact relevant to the propriety or desirability of the waiver.
3. The petitioner has failed to comply with the conditions set forth in the decision granting the waiver.
4. The alternate means for ensuring that the public health, safety and welfare will be adequately protected after the waiver is granted are insufficient.

761—11.8(17A) Records.

11.8(1) All records relating to waivers granted or denied under this chapter are open records. However, if a record contains personal information that is confidential, only the portion of the record that is nonconfidential will be made available for public inspection.

11.8(2) The director's staff division shall retain for five years records relating to waivers granted or denied under this chapter. The records are indexed by rule.

These rules are intended to implement Iowa Code sections 17A.7(2) "b" and 17A.9A and Executive Order Number 11, dated September 14, 1999.

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